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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Gary L. Wagoner,

10 Plaintiff,

11 v.

12 First Fleet Incorporated,

13 Defendant.
14

No. CV-22-00990-PHX-JAT

ORDER

15 Pending before the Court is Defendant First Fleet, Inc's ("First Fleet") Motion to
16 Dismiss. (Doc. 17). The Court now rules on this motion. Defendant's Motion to dismiss is
17 granted.

18 **I. BACKGROUND**

19 The relevant factual background has already been described in this Court's order
20 dismissing Plaintiff Dr. Gary Wagoner's initial complaint. (Doc. 14). Thus, this
21 background will only be briefly described here.

22 Plaintiff, a chiropractor in Phoenix, Arizona, treated Jeffrey Cagle in October of
23 2019. (*See* Doc. 17). As part of his agreement to treat Cagle, Plaintiff had Cagle assign him
24 all of his benefits and abilities under the Employee Retirement Income Security Act
25 (ERISA) to collect any payments from First Fleet. (*See* Doc. 1-3 at 7). After a number of
26 unsuccessful attempts to collect payment for services, Plaintiff brought suit alleging
27 violations of Arizona insurance law and common law. (*See* Doc. 17 at 2-3). His complaint
28 was dismissed on the grounds that his claims were preempted by ERISA. (*See* Doc. 14).

1 Plaintiff then filed an amended complaint claiming that First Fleet had violated ERISA
 2 sections 502, 510, and 511 because it had failed to pay benefits under the plan, had
 3 interfered with his patient's rights, and had engaged in coercive interference. (*See* Doc.
 4 15). Defendant then filed another Motion to Dismiss for Failure to State a Claim. (Doc.
 5 17). Plaintiff failed to file a response within 14 days and has not requested an extension of
 6 time.

7 **II. LEGAL STANDARD**

8 **A. Rule 12(b)(6)**

9 A complaint or claim can be dismissed under Rule 12(b)(6) either because it lacks
 10 "a cognizable legal theory" or because there are no "sufficient facts alleged under a
 11 cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–
 12 22 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
 13 1990)) (internal quotations omitted). In determining whether a complaint states a claim
 14 under this standard, the Court regards the allegations in the complaint as true and construes
 15 the pleadings in the light most favorable to the nonmovant. *See Outdoor Media Group, Inc.*
 16 *v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007). A pleading must contain "a short
 17 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ.
 18 P. 8(a)(2). This statement "need only give the defendant fair notice of what ... the claim is
 19 and the grounds upon which it rests," and "[s]pecific facts are not necessary." *Erickson v.*
 20 *Pardus*, 551 U.S. 89, 93 (2007) (internal quotation marks omitted). To survive a motion to
 21 dismiss, a complaint must state a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556
 22 U.S. 662, 678 (2009). This means that the Plaintiff must plead "factual content that allows
 23 the court to draw the reasonable inference that the defendant is liable for the misconduct
 24 alleged." *Id.*; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (to survive a motion to
 25 dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on
 26 its face").

27 **B. Local Rule 7.2(i)**

28 Although this is a 12(b)(6) motion to dismiss, there was no response filed. Thus,

1 this Court must look to Local Rule 7.2. District of Arizona Local Rule of Civil Procedure
 2 7.2(c) requires parties to file all responsive memoranda within fourteen days after service
 3 of the original motion. *See* L. R. Civ. 7.2. If a party fails to file a required responsive
 4 memorandum, Local Rule 7.2(i) states that the Court has the authority to consider that
 5 failure “a consent to the denial or granting of the motion” L. R. Civ. 7.2(i). Thus, if a
 6 party fails to respond to a motion to dismiss within fourteen days after service, the Court
 7 can deem that as consenting to the grant of the motion to dismiss by the plaintiff.

8 Applying a straightforward and text-based reading of the Local Rules it would seem
 9 that the application of Rule 7.2(i) is quite black and white: if a party fails to file a response
 10 within 14 days the Court can grant the underlying motion. Yet the Ninth Circuit has stated
 11 that although “[f]ailure to follow a district court’s local rules is a proper ground for
 12 dismissal” there are five general factors that a court must consider before dismissing a case:
 13 1. The public’s interest in expeditious resolution of litigation, 2. The court’s need to
 14 manage its docket, 3. The risk of prejudice to defendants, 4. Public policy favoring merits
 15 dispositions, and 5. The availability of less drastic sanctions. *See Ghazali v. Moran*, 46
 16 F.3d 52, 53 (9th Cir. 1995). And the district court must consider these factors explicitly.
 17 *See id.* at 54.

18 **III. DISCUSSION**

19 It is clear from the record that Plaintiff Wagoner did not file a response of any kind
 20 to the Motion to Dismiss his First Amended Complaint. Wagoner filed his amended
 21 complaint on August 18, 2022. (Doc. 15). Defendant filed a Motion to Dismiss on
 22 September 1, 2022. (Doc. 17). Since that time, nothing else has been filed in the case. Not
 23 only has there been no responsive memoranda submitted by Wagoner, there has not even
 24 been a motion for an extension of time. Consequently, Local Rule 7.2(i) applies here.

25 This means that the *Ghazali* factors must be applied to determine whether granting
 26 the motion to dismiss is appropriate. All five factors point toward dismissal here. The first
 27 factor, the interest in expeditious resolution, clearly favors dismissal. The fastest and most
 28 efficient way to resolve this case is to dismiss the matter with prejudice. As the Ninth

1 Circuit has noted, “the public’s interest in expeditious resolution of litigation *always* favors
2 dismissal.” *Irvin v. Madrid*, 749 Fed.Appx. 546, 547 (9th Cir. 2019) (quoting *Yourish v.*
3 *Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)) (emphasis added). The same is true of
4 the second factor. This Court can most efficiently manage its docket by resolving cases.
5 The third factor is not as clear, but still ultimately points towards dismissal. While there
6 would be no direct prejudice to Defendant, there will be some prejudice stemming from
7 the fact that Defendant will be forced to raise its legal points once again in reply to any
8 potential response this Court might order. Factors one through three, then, all weigh in
9 favor of dismissal.

10 When assessing the fourth factor, the policy favoring a merits determination, a court
11 should look to whether it is likely that Plaintiff’s “complaint could have survived at the
12 motion to dismiss stage” had it been considered on the merits. *Espy v. Independence Blue*
13 *Cross*, 613 Fed.Appx. 633, 634 (9th Cir. 2015). While it is not appropriate for this Court
14 to engage in a merits assessment when making a procedural determination, looking to the
15 general issues raised by the Motion to Dismiss is appropriate. Given the specific sections
16 of ERISA that Wagoner is bringing claims under, it does not seem likely that the complaint
17 will survive the motion to dismiss stage. While it is true that at this stage the Court reads
18 the facts in the light most favorable to the nonmoving party, it does not do so with the law.
19 And Wagoner, it appears, likely cannot bring the claims that he is attempting to bring under
20 ERISA. Ultimately, the fourth factor also weighs in favor of dismissal.

21 Finally, the fifth factor cautions the Court that it should not dismiss if there are less
22 drastic sanctions that it can apply. There are less serious sanctions available here. First, this
23 Court could simply order Wagoner to file a reply. This would almost be a non-sanction.
24 And given that over four months have passed since the motion to dismiss was filed, this
25 seems inappropriate. The Court could also dismiss this case without prejudice, giving
26 Wagoner the ability to refile. Yet this too does not seem to be right for a number of reasons.
27 First, Defendant has already filed two full merits briefings, once for the initial complaint,
28 and again for the amended complaint. Forcing it to do this for a third time would only place

1 a burden on its time and resources as well as those of this Court. Second, it is not as if
2 Wagoner is unfamiliar with the procedural rules and requirements. He filed a response to
3 the initial Motion to Dismiss. (Doc. 9). Thus, he knows what he must do under the federal
4 and local rules. It seems, then, that this factor also points towards dismissal with prejudice.
5 But even if it did not. Even if this factor clearly pointed toward a less drastic alternative,
6 the other four factors all point towards dismissal with prejudice. Ultimately then, under
7 *Ghazali*, this Court should dismiss this case with prejudice. And that is what it will do.

8 This result comports with the plain text of Local Rule 7.2(i) which states that if a
9 party fails to serve and file the required responsive memoranda this failure “may be deemed
10 a consent to the ... granting of the motion and the Court may dispose of the motion
11 summarily.” L.R.Civ. 7.2(i). This is what occurred here. Consequently, this Court will
12 follow the letter of the law and grant the Motion to Dismiss.

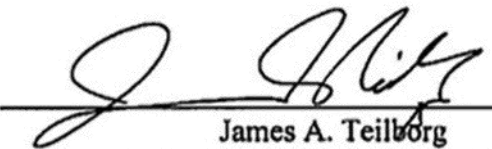
13 IV. CONCLUSION

14 Based on the foregoing,

15 **IT IS ORDERED** that Defendant First Fleet, Inc’s Motion to Dismiss (Doc. 17) is
16 **GRANTED.**

17 **IT IS FURTHER ORDERED** that the Clerk of Court shall enter judgment,
18 dismissing this case with prejudice.

19 Dated this 19th day of January, 2023.

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24 James A. Teilborg
25 Senior United States District Judge
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